**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| **THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,** | ) | |
| **Applicant,** | ) | |
| **v.** | ) | **Case No. 05-CV-53-TCK-FHM** |
| **PUBLIC SERVICE COMPANY OF OKLAHOMA,** | ) | |
| **Respondent.** | ) | |

# PSO'S RESPONSE IN OPPOSITION TO BNSF'S MOTION TO RECONSIDER THE JULY 14, 2006 ARBITRATION CONFIRMATION ORDER AND FINAL JUDGMENT

Of Counsel:

Doerner, Saunders, Daniel
& Anderson, L.L.P.
320 South Boston Avenue
Suite 500
Tulsa, Oklahoma 74103

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

William C. Anderson, OBA #292
Richard P. Hix, OBA #4241
Lewis N. Carter, OBA #1524
320 South Boston Avenue
Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

John H. LeSeur
Frank J. Pergolizzi
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
Public Service Company of Oklahoma

Dated: August 9, 2006

# TABLE OF CONTENTS

BACKGROUND .......... 2

ARGUMENT .......... 6

A. Motions to Reconsider Final Judgments are Rarely Granted .......... 7

B. BNSF's Failure to Timely File a Motion to Vacate the Award Provides No Basis for Setting Aside the Judgment .......... 8

C. BNSF's Reconsideration Motion is Not Supported by Applicable Law .......... 11

D. BNSF's Contentions that the Arbitration Board Exceeded its Authority are Frivolous .......... 13

1. The Standard of Review of Arbitration Awards is Extremely Limited .......... 13

2. The Arbitration Board Clearly Did Not Exceed its Authority .......... 14

3. The Arbitration Board Did Not Manifestly Disregard the Law .......... 15

4. BNSF's Vacation Request is Doomed .......... 17

CONCLUSION .......... 18

CERTIFICATE OF SERVICE .......... 20

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| **THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,** | ) | |
| **Applicant,** | ) | |
| **v.** | ) | **Case No. 05-CV-53-TCK-FHM** |
| **PUBLIC SERVICE COMPANY OF OKLAHOMA,** | ) | |
| **Respondent.** | ) | |

**PSO'S RESPONSE IN OPPOSITION TO BNSF'S MOTION TO RECONSIDER THE JULY 14, 2006 ARBITRATION CONFIRMATION ORDER AND FINAL JUDGMENT**

On July 24, 2006, BNSF Railway Company ("BNSF")[1] filed a "Motion to Reconsider the July 14, 2006 Arbitration Confirmation Order and Final Judgment" ("Reconsideration Motion"). In its Reconsideration Motion, BNSF asks the Court to vacate the Final Judgment ("Judgment") this Court entered on July 14, 2006 in this proceeding. Public Service Company of Oklahoma ("PSO") requests that the Court deny BNSF's Reconsideration Motion because BNSF is clearly not entitled to the extraordinary relief it requests. In support hereof PSO states as follows:

[1] References to BNSF include its corporate predecessors.

## BACKGROUND

1. PSO and BNSF were parties to a rail transportation agreement (the "Agreement"). The Agreement called for arbitration of certain pricing disputes.

2. In 1992, PSO invoked the arbitration provisions in the Agreement. Pursuant to the Agreement, PSO selected a party-appointed arbitrator (Paul H. Lamboley, Esq.), BNSF selected a party-appointed arbitrator (Emried D. Cole, Esq.) and this Court (Ellison, C. J.) selected a neutral third arbitrator (Deryl Lee Gotcher, Esq.)

3. The three member arbitration board proceeded to arbitrate the pricing dispute and entered an award in 1994 ("1994 Award"). The 1994 Award accorded substantial pricing relief to PSO.

4. Rather then accept the clearly correct 1994 Award, BNSF instituted a long, drawn-out post-Award process where BNSF contended the 1994 Award should be vacated because, BNSF alleged, Mr. Gotcher was evidently partial in favor of PSO.

5. In the post-1994 Award proceedings, BNSF never produced any evidence to support its baseless charges against Mr. Gotcher. BNSF's request to vacate the Award was rejected by this Court[2] and the Tenth Circuit.[3]

---

[2] See Burlington N. R.R. v. Pub. Serv. Co. of Okla., No. 92-C-1196-E (N.D. Okla. Dec. 6, 1994).

[3] Pub. Serv. Co. of Okla. v. Burlington N. R.R., No. 95-5017 (10th Cir. Oct. 20, 1995).

6. The 1994 arbitration board reserved jurisdiction to resolve disputes concerning implementation of the 1994 Award. Following the board's issuance of the 1994 Award, BNSF fomented a dispute concerning the implementation of the 1994 Award. Specifically, BNSF claimed that certain payments PSO made to BNSF, calculated using rates less than $11.77 per ton, were not permitted under the 1994 Award and the Agreement.

7. After extensive delays, BNSF invoked the board's retained jurisdiction to resolve its claim. In conjunction with this decision, BNSF filed an application on November 5, 2004 asking the United States District Court for the Western District of Oklahoma to appoint a new arbitrator to replace Mr. Gotcher, who had passed away.

8. After PSO objected to BNSF's efforts to end-run the jurisdiction of this Court to appoint an arbitrator to replace Mr. Gotcher, BNSF consented to the transfer of its appointment action to this Court. The parties further agreed to ask that this Court direct the 1994 arbitration board (with a new third arbitrator) to address BNSF's claim.[4]

9. On March 21, 2005, the Court (Ellison, J.) appointed the Honorable Thomas R. Brett to serve as the new third arbitrator on the Board. The Court also directed the arbitration board to address BNSF's claim.

---

[4] See Joint Motion to Appoint Arbitrator (filed Feb. 14, 2005).

10. The parties proceeded to arbitrate BNSF's claim before the arbitration board. On April 24, 2006, the board issued its decision and award ("Award"). The board's Award "denied" BNSF's claim in its entirety and determined "PSO is the prevailing party herein." Award at 21.

11. On May 9, 2006, PSO moved the Court to issue an order confirming the Award under Section 9 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9.[5] Section 9 provides that "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the FAA]."

12. If a party to an arbitration seeks to have an award vacated, modified or corrected under Sections 9 and 10 of the FAA, it must file a motion asking the court for this relief. See 9 U.S.C. §§ 10, 11 (court may vacate, modify or correct an award only upon the application of a party to the arbitration), 9 U.S.C. § 6 (applications under FAA §§ 10 and 11 shall be made in the form of "motions").

13. BNSF did not file a timely motion to vacate, modify or correct the Award in response to PSO's Confirmation Motion. Instead, BNSF first asked the Court to deny PSO's Confirmation Motion[6] and later asked the Court to stay PSO's

---

[5] See Respondent's Motion for Order Confirming Arbitration Award and Motion for Entry of Judgment on Award (filed May 9, 2006) ("Confirmation Motion").

[6] See BNSF's Response in Opposition to Respondent's Motion for Order Confirming Arbitration Award and Motion for Entry of Judgment on Award at 4-5 (filed May 19, 2006) ("BNSF's May 19 Response").

Confirmation Motion.[7] PSO responded in opposition to BNSF's requests and asked the Court to grant PSO's Confirmation Motion forthwith.[8]

14. On July 14, 2006, the Court entered its order confirming the Award ("Confirmation Order"). The Confirmation Order states in pertinent part:

> Under 9 U.S.C. § 9, the Court must confirm the Award "unless the award is vacated, modified, or corrected" under §§ 10 and 11 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 10 and 11. The Award has not been vacated, modified, or corrected, so entry of an Order confirming the Award is appropriate.

Id. at 1. The Court also entered Judgment on the Award.

15. On July 24, 2006, BNSF filed its Reconsideration Motion. BNSF also filed a second document on July 24, 2006 entitled "Motion and Supporting Memorandum to Vacate and Correct the Arbitration Award of April 24, 2006" ("Motion to Vacate").

---

[7] BNSF's Motion to Amend its Response Brief in Opposition to Confirmation of the Arbitration Award to File at 3 (filed June 19, 2006) ("BNSF's June 19 Motion").

[8] See Respondent's Reply In Support of its Motion for Order Confirming Arbitration Award and Motion for Entry of Judgment on Award (filed June 1, 2006) ("PSO's June 1 Reply"); PSO's Response to BNSF's "Motion to Amend its Response Brief in Opposition to Confirmation of the Arbitration Award to File" (filed June 22, 2006) ("PSO's June 22 Response").

## ARGUMENT

The Court should summarily deny BNSF's Reconsideration Motion. BNSF's Reconsideration Motion requests that this Court set aside the Judgment under Fed. R. Civ. P. 59(e). See Reconsideration Motion at 1. Such requests are "rare[ly]" granted[9] and clearly should not be granted here.

BNSF argues that the Court should vacate its Judgment because BNSF "informed" the Court it would file a motion to vacate the Award by July 24, 2006. See Reconsideration Motion at 3. Under the FAA, BNSF's vacation motion was due on May 30, 2006. BNSF attempted to circumvent this deadline by "inform[ing]" the Court that it would make a filing on or before July 24, 2006. See BNSF's June 19 Motion at 2. BNSF's flaunting of the FAA's post-Award deadlines and procedures provides no valid basis to set aside the Judgment.

BNSF also argues that the Court should vacate its Judgment because the arbitration board "exceeded its authority." Reconsideration Motion at 2. In fact, the arbitration board addressed the issue the parties, and the Court, posed to the board and the board correctly resolved this issue. BNSF's frivolous claims to the contrary also provide no basis to set aside the Court's Confirmation Order and Judgment.

---

[9] Brumark Corp. v. Samson Res. Corp., 57 F.3d 941, 944 (10th Cir. 1995).

**A. Motions to Reconsider**
**Final Judgments are Rarely Granted**

The Federal Rules of Civil Procedure do not permit reconsideration of final judgments. Where, as here, a party has sought "reconsideration" of a final judgment within ten days of the entry of the judgment, the motion is treated as one asking a court to alter or correct the judgment under Fed. R. Civ. P. 59(e). As recently summarized by the Chief Judge of this Court:

> "The Federal Rules of Civil Procedure do not recognize a 'motion to reconsider.' Instead the rules allow a litigant subject to an adverse judgment to file either a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R.Civ.P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). Plaintiff's motion was filed within 10 days of the Court's order dismissing her case, so the Court will treat it as a motion to alter or amend judgment under Fed.R.Civ.P. 59(e). *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1242 (10th Cir. 2006).

Henry v. The Principal Life Ins. Co., 2006 WL 1967374, at *1 (N.D. Okla. July 12, 2006) (Eagan, C.J.).

A Rule 59(e) request to alter or amend a judgment "is an extreme remedy to be granted in rare circumstances." Brumark Corp., supra, 57 F.3d at 944; accord Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2810.1 (1995) (Rule 59(e) relief "is an extraordinary remedy which should be used sparingly"). A Rule 59(e) motion will be granted only in extremely limited circumstances resulting from "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice." Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000); Brumark Corp., supra, 57 F.3d at 944.

The Rule 59(e) standards have been narrowly construed by the Tenth Circuit:

> [A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. . . . It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing. *See Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991).

Servants of the Paraclete, 204 F.3d at 1012. Accord Johnston v. Cigna Corp., 789 F. Supp. 1098, 1101 (D. Colo. 1992), aff'd, 14 F.3d 486 (10th Cir. 1993) ("a motion for reconsideration is not a license for a losing party's attorney to get a 'second bite at the apple' and make legal arguments that could have been raised before"). In its Reconsideration Motion, BNSF does not cite Rule 59(e) standards, much less demonstrate that the Judgment should be vacated under the strict standards.

### B. BNSF's Failure to Timely File a Motion to Vacate the Award Provides No Basis for Setting Aside the Judgment

BNSF argues that it was unfair for the Court to enter its Confirmation Order and Judgment because BNSF "informed" the Court that it planned to file a motion to vacate by July 24, 2006. See Reconsideration Motion at 3. However, the law does not permit a party to ignore governing FAA post-Award filing deadlines and procedures simply by "inform[ing]" a court that it has decided not to comply with them.

The FAA provides for expedited post-Award procedures. These procedures are quick, and summary, because "a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings."[10] Under the expedited FAA procedures, a court "must grant" a confirmation motion "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the FAA]." See FAA § 9, 9 U.S.C. § 9; P&P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 870 (10th Cir. 1999).

PSO filed its Confirmation Motion on May 9, 2006. The FAA required that this motion be considered under the "law for making and hearing motions."[11] Under the rules of the Court, BNSF's response to PSO's Confirmation Motion was due on May 30, 2006.[12] Any BNSF motion seeking to vacate, modify or correct the Award was also due on May 30 since, under the FAA, opposition to a confirmation motion is perfected in the form of a motion asking the Court to vacate, modify or correct the Award under FAA §§ 10 and 11, 9 U.S.C. §§ 10 and 11.[13]

---

[10] Foster v. Turley, 808 F.2d 38, 42 (10th Cir. 1986).

[11] See FAA § 6, 9 U.S.C. § 6.

[12] See United States District Court for the Northern District of Oklahoma, Local Civil Rules, LCvR 7.2(e) (responses to motions are due within 18 days after the motion is filed). Since 18 days after May 9, 2006 (i.e., May 27, 2006) fell on the Saturday before Memorial Day, the due date for BNSF response was Tuesday, May 30, 2006. See Fed. R. Civ. P. 6(a).

[13] Parties seeking to set aside an award under FAA §§ 10 and 11 are required to file an "application." Id. This application is to be in the form of a motion. See FAA § 6, 9 U.S.C. § 6.

BNSF is represented by sophisticated counsel that knows, or should have known, that a timely motion to vacate the Award was due on May 30, 2006. BNSF chose not to make a timely filing. Instead, BNSF sought to inject delay into an expedited process by, in effect, attempting to grant itself a two month extension (through July 24, 2006) to respond to PSO's Confirmation Motion. The Court properly ignored BNSF's maneuvering and, in the absence of a timely motion to vacate, modify or correct the Award, summarily confirmed the Award.

The Court's action is not unfair to BNSF. BNSF engaged in extensive dilatory tactics following the issuance of the 1994 Award and started down a similar path following the issuance of the 2006 Award. BNSF has only itself to blame for its failure to abide by the clear FAA post-Award procedures and deadlines. Moreover, even assuming that BNSF had a valid argument for vacating the Judgment, and BNSF does not, it would be most unfair to PSO for the Court to vacate its Judgment. Vacation would produce the very delay BNSF sought to interject into these post-Award proceedings. Vacation of the Judgment also would defeat the underlying purpose of these post-Award proceedings – prompt resolution of disputes through arbitration.

### C. BNSF's Reconsideration Motion is Not Supported by Applicable Law

BNSF argued in its pre-Judgment filings that the FAA did not require BNSF to file a motion to vacate the Award until July 24, 2006.[14] BNSF predicated this

[14] See BNSF's May 19 Response at 4; BNSF=s June 19 Motion at 2.

frivolous argument on Section 12 of the FAA. Section 12 establishes a three month limitations period for filing motions to vacate arbitration awards.

In its responsive filings,[15] PSO demonstrated that every court that had considered this issue had rejected BNSF's construction of Section 12. See The Hartbridge (In re North of Eng. S.S. Co.), 57 F.2d 672 (2d Cir. 1932); RPJ Energy Fund Mgmt., Inc. v. Collins, 552 F. Supp. 946 (D. Minn. 1982); Kanuth v. Prescott, Ball & Turben, Inc., 1990 WL 91579 (D.D.C. June 19, 1990). As summarized in Kanuth:

> As a statute of limitations on motions to vacate, § 12 does not prevent a party seeking to confirm from doing so within the three-month period. First, § 9 specifically states that a party may move to confirm "at any time after the award is made." 9 U.S.C. § 9. Nor do the few cases dealing with the question of delaying a motion to confirm support another view. [Citing *The Hartbridge* and *RPJ Energy*.]
>
> * * * *
>
> Based upon these authorities, the Court concludes that [the defendant] has no statutory right to the three-month period after the award to sort out options, mull over tactics, or hold up confirmation of the award. . . .

Id. at *2-3.

BNSF argues that The Hartbridge, RPJ Energy and Kanuth support its Reconsideration Motion. See Reconsideration Motion at 3. However they clearly do not. All these cases hold that a party cannot do what BNSF attempted to do, i.e. "hold up confirmation of the award" for three months while BNSF "sorted-out options" and

---

[15] See PSO's June 1 Reply at 2-4; PSO's June 22 Response at 2.

"mulled over tactics." Kanuth at *3. And, as the Second Circuit explained in The Hartbridge, a party that fails to present timely pre-judgment objections to an arbitration award must present an "adequate excuse" for its inaction:

> [A] motion to confirm puts the other party to his objections. He cannot idly stand by, allow the award to be confirmed and judgment thereon entered, and then move to vacate the award just as though no judgment existed. *See Gaines v. Clark*, 23 Minn. 64; *Brace v. Stacy*, 56 Wis. 148, 14 N.W. 51. Section 12 sets an outside limit within which a notice to vacate must be served; it does not say that such a motion may be made at any time within the three months even though the award has gone into judgment. After judgment we think the award can be vacated only if the judgment can be, and to vacate the judgment an adequate excuse must be shown for not having presented objections to the award when the motion to confirm was heard.

Id., 57 F.2d at 673.

The Second Circuit held on the facts presented in The Hartbridge that the party opposing confirmation had presented "an adequate excuse" – the party had advised the Court that it intended to move to vacate the award but "could not make its motion forthwith because of the loss of certain exhibits used by the arbitrators." Id. In the instant case, BNSF has offered no excuse, much less an "adequate excuse," for its delays.

### D. BNSF's Contentions that the Arbitration Board Exceeded its Authority are Frivolous

BNSF also contends that the Court should set aside its Confirmation Order and Judgment because, BNSF alleges, the arbitration board "exceeded its authority." Reconsideration Motion at 2. BNSF's contentions, as presented in this proceeding, are frivolous.[16]

### 1. The Standard of Review of Arbitration Awards is Extremely Limited

Judicial review of arbitration decisions is "among the narrowest known to law." As recently summarized by the Tenth Circuit:

> Judicial review of arbitration panel decisions is extremely limited; indeed, it has been described as "among the narrowest known to law." *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001) (quotation omitted).

Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C., 430 F.3d 1269, 1275 (10th Cir. 2005).

The limited grounds for setting aside an award are set forth in Section 10 of the FAA and accompanying case law. As also recently summarized by the Tenth Circuit:

> Under § 10 of the Federal Arbitration Act, a court may vacate an arbitration award "in certain instances of fraud or corruption, arbitrator misconduct, or 'where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, definite award upon the subject matter submitted was not made.'" *Id.* (quoting 9 U.S.C. § 10(a)(4)). In addition, we have acknowledged a judicially-created basis for vacating an award when the arbitrators acted in "manifest disregard" of the law. *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995). This standard requires a finding that the panel's decision exhibits "willful

---

[16] These arguments also could have been raised in a timely motion to vacate filed before the Judgment was entered. As a result, they provide no basis under Fed. R. Civ. P. 59(e) to alter the Judgment. See Servants of the Paraclete, supra, 204 F.3d at 1012.

> inattentiveness to the governing law." *Id.* Merely "erroneous interpretations or applications of law are not reversible." *Id.* Put another way, we "[r]equir[e] more than error or misunderstanding of the law[.] [A] finding of manifest disregard means the record will show the arbitrators knew the law and explicitly disregarded it." *Bowen*, 254 F.3d at 932 (internal citation omitted).

Id.

### 2. The Arbitration Board Clearly Did Not Exceed its Authority

BNSF claims that the arbitration board exceeded their authority in violation of § 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4) (arbitration award should be set aside "where the arbitrators exceeded their powers"). The "exceeded their powers" standard typically applies where arbitrators "rule on a question not put before them." Valentino v. Smith, 1992 WL 427881 at *5 (W.D. Okla. Sept. 30, 1992). As applied here, BNSF's § 10(a)(4) contentions are baseless because the arbitration board decided the question the parties, and the Court, expressly asked the board to resolve.

In the pre-Award proceedings the parties jointly requested that this Court direct the arbitration board to resolve BNSF's claim.[17] The Court proceeded to direct the board to resolve this issue. The Court's March 21, 2005 order states in pertinent part:

> The arbitration board shall adjudicate BNSF's claim that, pursuant to the May 16, 1994, Decision and Award (the "Award") and the parties' Coal Transportation Agreement dated August 28, 1985, the amount of the rate for BNSF single-line service, as provided from the Award, cannot be less than $11.77 per ton ("BNSF's claim").

Id. at 1-2.

---

[17] See Joint Motion to Appoint Arbitrator at 3 (filed Feb. 14, 2005).

In its Award, the arbitration board recited the question presented by the parties and the Court (see Award at 1), addressed the question presented (see Award at 17-21) and decided it (see Award at 21). Thus, it is clear that the arbitration board did not "exceed its authority." Instead, the board exercised its authority to resolve the issue the parties, and this Court, asked the board to resolve.

### 3. The Arbitration Board Did Not Manifestly Disregard the Law

BNSF's real claim is not that the board exceeded its authority but that the board did not rule in its favor. See Reconsideration Motion at 2. In fact, the board's decision is clearly correct and, in any event, this Court cannot re-review the merits, as BNSF requests.

In its 1994 Award, the board prescribed a $11.77 per ton rate for single-line service effective as of July 1, 1992. See Award at 7, 18. The board further directed that the rate be adjusted (up or down) using the board's prescribed rate adjustment procedure. Id. The parties subsequently amended the Agreement to include the board-ordered relief. Id. at 9. PSO proceeded to pay the adjusted rates which, during some time periods, were adjusted below $11.77 per ton. Id. at 10. The board clearly and correctly ruled that PSO was permitted under the Award and the Agreement to pay rates under $11.77 per ton on the involved shipments. Id. at 17-21.

The board also properly rejected BNSF's contention – a contention BNSF repeats in its Reconsideration Motion[18] – that the board improperly "deleted" the

---

[18] Id. at 2.

Agreement's Base Rate. The Agreement set a Base Rate of $14.00 per ton. See Award at 19. The Agreement further provided that the arbitration board could set renegotiated rates below the $14.00 per ton Base Rate. Id. The board proceeded to do so in the 1994 Award and in so doing was not required, nor did it, establish a "rate floor" at $11.77 per ton. See Award at 19-21.

More importantly for present purposes, this Court cannot do what BNSF requests – second guess the clearly correct determinations by the board. See United Paperworkers Int'l Union v. Misco, Inc. 484 U.S. 29, 38 (1987) (courts must refrain from reversing an arbitration simply because the court disagrees with the result) Where, as here, an arbitration board is called upon to construe its prior award, and a contract between the parties, the Court's sole function under the FAA is to determine whether the arbitration board "manifestly disregarded" the law. See Dominion Video, 430 F.3d at 1275. To make out such a case, a party must demonstrate "the arbitrators knew the law and explicitly disregarded it." Id.

In the instant case, the board explicitly acknowledged the governing interpretative standards (see Award at 17); applied these standards to the Agreement and the Award (see id. at 18-20); and based its conclusions on the application of the standards. See id. at 21. The board's carefully reasoned decision clearly demonstrates that the arbitrators knew the law and expressly applied it. They most certainly did not manifestly disregard the law.

BNSF cites the board's "dissenting" opinion. See BNSF Reconsideration Motion at 2-3. BNSF fails to inform the Court that the dissenting opinion was authored by BNSF's party-appointed arbitrator, Mr. Cole. The majority opinion, rendered by Judge Brett and PSO's party appointed arbitrator, Mr. Lamboley, is controlling. Moreover, Mr. Cole simply disagreed with the board's construction of the Award and the Agreement. See Award at 25. The board's decision dispositively refutes Mr. Cole's interpretation (see id. at 20) and, as discussed above, it is not for the Court to second-guess the merits of the board majority's clearly correct construction of the Award and the Agreement. See Bowen v. Amoco Pipeline Co., 254 F.3d 925, 935 n.5 (10th Cir. 2001) ("courts should not second-guess an arbitrator's decision").

**4. BNSF's Vacation Request is Doomed**

BNSF's asserted grounds for setting aside the Award are frivolous. They provide no basis for vacating the Confirmation Order and Judgment. More to the point is the recent admonition of Chief Judge Benson of the United States District Court for the District of Utah concerning the pursuit of "doomed" post-Award vacation actions:

> While losing an arbitration may be unpleasant for an attorney to communicate and a client to digest, the experience is not significantly improved by the instigation of a doomed – and no doubt costly – legal action.

Commercial Refrigeration, Inc. v. Layton Constr. Co., 319 F. Supp.2d 1267, 1271 (D. Utah 2004). BNSF's late-filed vacation motion is clearly doomed and these post-Award proceedings should not be further delayed because of it.

**CONCLUSION**

For the reasons discussed above, PSO requests that the court deny BNSF's Reconsideration Motion. PSO continues to reserve the right to seek to recover the attorneys' fees it has incurred in the post-Award confirmation proceedings.

Respectfully submitted,

s/ Lewis N. Carter
William C. Anderson, OBA #292
Richard P. Hix, OBA #4241
Lewis N. Carter, OBA #1524
Johnathan D. Horton, OBA #19126
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
320 South Boston Avenue, Suite 500
Tulsa, Oklahoma 74103-3725
(918) 582-1211; (918) 591-5362 (fax)

John H. LeSeur, District of Columbia Bar No. 293357
Frank J. Pergolizzi, District of Columbia Bar No. 405174
SLOVER & LOFTUS
1224 17th Street, N.W.
Washington, D.C. 20036
(202) 347-7170; (202) 347-3619 (fax)

Attorneys for Respondent,
PUBLIC SERVICE COMPANY OF OKLAHOMA

**CERTIFICATE OF SERVICE**

I hereby certify that on the 9th day of August, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based upon the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Hugh D. Rice, Esq.
Rachel Bussett, Esq.
Patricia L. Franz, Esq.
RAINEY, ROSS, RICE & BINNS
120 North Robinson, Suite 735W
Oklahoma City, Oklahoma 73102

The following party will be noticed by U.S. first-class mail:

Harry L. DeLung, Jr., Esq.
FREEBORN & PETERSON LLP
311 South Wacker Drive, Suite 3000
Chicago, Illinois 60606-6677

s/ Lewis N. Carter
Lewis N. Carter

552839.1